DALAM MAHKAMAH RAYUAN MALAYSIA

(BIDANGKUASA RAYUAN)

RAYUAN SIVIL NO : P-02(NCvC)(W)-2163-11/2019

ANTARA

RESTORAN NASI KANDAR IRFANAH SDN BHD … PERAYU

DAN

THE NEW STRAITS TIMES PRESS (MALAYSIA) BERHAD … RESPONDEN

(DIDENGAR BERSAMA)

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RAYUAN SIVIL NO. P-02(NCVC)(W)-2164-11/2019

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THE NEW STRAITS TIMES PRESS (MALAYSIA) BERHAD … PERAYU

DAN

3. THEYAGARAJAN A/L MUNIANDY

4. RESTORAN NASI KANDAR IRFANAH SDN BHD … RESPONDEN-RESPONDEN

Dalam Mahkamah Tinggi Malaya Di Pulau Pinang

Dalam Negeri Pulau Pinang

Guaman No. PA-23 NCVC-23-07/2018]

Antara

Theyagarajan A/L Muniandy … Plaintif

Dan

The New Straits Times Press (Malaysia) Berhad … Defendan

(Disatukan Dan Didengar Bersama)

Dalam Mahkamah Tinggi Malaya Di Pulau Pinang

Dalam Negeri Pulau Pinang

Guaman No. PA-23 NCVC-24-07/2018]

Antara

Restoran Nasi Kandar Irfanah Sdn Bhd … Plaintif

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The New Straits Times Press (Malaysia) Berhad … Defendan

CORAM:

NOR BEE BINTI ARIFFIN, JCA

HAJI AHMAD NASFY BIN HAJI YASIN, JCA

GUNALAN A/L MUNIANDY, JCA

JUDGMENT

INTRODUCTION

[1] For ease of reference, the parties will be referred to as follows:

(a) The Appellant (Appeal No. 2164) & the Respondent (Appeal No. 2163) as **"NSTP"**;

(b) The 1st Respondent (Appeal No. 2164) as **"Theyagarajan"**;

(c) The 2nd Respondent (Appeal No. 2164) and the Appellant (Appeal No. 2163) as **"RNKI"**.

[2] NSTP (Appeal No. 2164) appealed against the whole of the decision of the Learned High Court Judge ["LHCJ"] in allowing Theyagarajan's claim for libel against NSTP and such part only of the decision of the LHCJ in allowing in part of RNKI's claim for libel against NSTP.

[3] RNKI (Appeal No. 2163) appealed against such part only of the decision of the LHCJ on the quantum of damages awarded.

BACKGROUND FACTS

[4] Theyagarajan was then a director of RNKI. Theyagarajan's and RNKI's actions for libel against NSTP are founded on the following publications which they alleged are defamatory of them:

(a) an online article entitled "2 famous Penang Nasi Kandar restaurants infested with rats, cockroaches, ordered shut" published by NSTP on 13.3.2017 on its website known as NST Online ["the 1 st Publication"];

(b) a post containing a link to the 1st Publication posted by NSTP on 13.3.2017 through its Facebook page known as NST Online ["the 2nd Publication"];

(c) an article under the heading "Dirty Nasi Kandar" published by NSTP in the 14.3.2017 issue of the 'New Straits Times" newspaper ["the 3rd Publication"].

[5] Theyagarajan and RNKI alleged that the 1st, 2nd and 3rd Publications are defamatory of them as they contained a photograph of Theyagarajan allegedly seated at one of RNKI's premises ["the Photograph"].

[6] Theyagarajan commenced an action for libel against NSTP in Suit No. 23, seeking general damages ["GD"] for loss of his reputation and goodwill as a restaurant operator for 16 years and the loss of business of RNKI and its reputation.

[7] RNKI commenced an action for libel against NSTP in Suit No. 24, seeking for GD loss of goodwill in its business of 16 years; the loss of business profits of RNKI and its reputation and also sought special damages ["SD"] in respect of the costs incurred for the closure of its business.

[8] NSTP's pleaded case is that:

(a) if the 1st, 2nd and 3rd Publications when read in their context as a whole, they do not contain any statements and/or words which are defamatory of Theyagarajan and RKNI and in fact do not refer to them.

(b) The 1st, 2nd and 3rd Publications instead refer to two (2) famous nasi kandar restaurants in Penang i.e. Line Clear Restaurant and Yasmeen Nasi Kandar Restaurant.

(c) NSTP relies on the defences of justification, fair comment and qualified privilege.

FINDINGS OF THE HIGH COURT

[9] The LHCJ allowed Theyagarajan and RNKI's claims for libel against NSTP and awarded general damages in the sum of RM50,000.00 each to Theyagarajan and RNKI. However, RNKI's claim for special damages was dismissed. NSTP was ordered to pay costs of RM15,000.00 for both actions.

[10] The LHCJ's grounds can be summarised as follows:

(a) if any reasonable man saw the Photograph and read the information thereunder, they will automatically conclude that the dirty restaurant in question is the restaurant belonging to Theyagarajan and RNKI, and not Line Clear Restaurant and Yasmeen Nasi Kandar Restaurant as the photograph and names of both do not appear in the said Publications.

(b) When RKNI is not a dirty restaurant, but the article showed photograph of RKNI's and Theyagarajan's restaurant premises together with information relating to dirty premises. As such, the statements made by NSTP are untrue, embarrassing and defamatory to both of them.

(c) The Photograph is a clear piece of evidence that the said Publications refer to Theyagarajan and RNKI. If NSTP's intention is to make a statement that Line Clear Restaurant and Yasmeen Nasi Kandar Restaurant are dirty, it can be done without the Photograph.

(d) NSTP had disseminated an untrue photograph and information pertaining to Theyagarajan and RNKI.

(e) The damages sought by Theyagarajan and RNKI are too high and unreasonable. There is no evidence to show that Theyagarajan is a person of high stature in society and his reputation was severely damaged by the said Publications. There is also no evidence to show that RNKI is a famous

restaurant in Penang. An award for general damages in the sum of RM50,000 to each of them is reasonable. But, RNKI's claim for special damages in respect of the costs incurred for the closure of its business is dismissed as the same is not proven.

OUR DECISION

[11] We propose to first deliberate on NSTP's appeal which is primarily on liability. Its grounds of appeal are well summarised in its submission as follows:

1. Theyagarajan's and RNKI's respective pleadings are defective as they failed to plead the defamatory meanings allegedly imputed to them from the words and/or statements complained by them as contained in the Impugned Publications (Ground No.2).

2. The words and/or statements contained in the Impugned Publications are not defamatory of Theyagarajan and RNKI (Grounds No. 3 and 9).

3. The words and/or statements contained in the Impugned Publications are not capable of referring to Theyagarajan and RNKI and in fact do not refer to Theyagarajan and RNKI, despite the Photograph being published in the Impugned Publications (Grounds No. 3, 4, 5 and 6).

4. The LHCJ failed to apply the correct reasonable man test based on the current development of society on the reading of news reported on social media such as Facebook (Ground No. 7).

5. The LHCJ misconstrued the concept of innuendo in a libel action as being one of the means to establish the second element of defamation (i.e. whether the alleged defamatory words refer to Theyagarajan and RNKI) instead of its true concept which relates to the first element of defamation in ascertaining the meaning of the words which are alleged to be defamatory (Ground No. 8).

6. The LHCJ failed to consider the defences of justification, fair comment and qualified privilege relied upon by the NSTP (Ground No. 10).

7. The LHCJ failed to appreciate that the defences of justification, fair comment and qualified privilege relied upon by NSTP were not challenged and/or rebutted ny Theyagarajan and RNKI (Ground No. 11).

8. NSTP cannot be held liable against Theyagarajan and RNKI for libel as NSTP's defences of fair comment and qualified privilege stood unrebutted by Theyagarajan and RNKI due to the absence of the particulars of the facts and matters from which express or actual malice is to be inferred in Theyagarajan's and RNKI's pleadings (Ground No. 12 and 13); and

9. The award of general damages in the sum of RM50,000.00 each to Theyagarajan and RNKI is exorbitant and contrary to the findings made by the The LHCJ (Ground No. 14 and 15).

[12] The crux of the Appellant's contention was in regard to the issue as to whether the words and/or statements contained in the 1st, 2nd and 3rd Publications refer to Theyagarajan and RNKI. If the answer is in the negative, it follows that the words and/or statements contained in the 1st, 2nd and 3rd Publications are therefore not defamatory of Theyagarajan and RNKI. It was not in dispute that there was publication of all the above 3 articles/reports to the general public.

[13] We accept that the threshold test for defamation is as set out in the oft-quoted leading case of **Ayob Bin Saud v TS Sambanthamurthi [1989]** 1 MLJ 315 as follows:

> "In our law on libel, which is governed by the Defamation Act 1957, the burden of proof lies on the plaintiff to show (1) the words are defamatory; (2) the words refer to the plaintiff; and (3) the words were published. Where a defence of qualified privilege is set up, as in the present case, the burden lies on the defendant to prove that he made the statement honestly, and without any indirect or improper motive. Then, if he succeeds in establishing qualified privilege, the burden is shifted to the plaintiff in this case to show actual or express malice which upon proof thereof, communication made under qualified privilege could no longer be regarded as privilege: Rajagopal v Rajan."

[14] What was primarily in issue before us was whether the Respondent had established the threshold test for defamation, in particular, whether the said impugned publications refer to the Respondents and whether the words or statements contained therein said to be offensive were defamatory of the Respondents. In this regard, the Appellant highlighted to us that the Respondents failed to plead the defamatory meanings, either in their natural and ordinary meaning or by way of innuendo, allegedly imputed to them from a plain reading of the words and/or statements contained in the 1st, 2nd and 3rd Publications.

[15] We will first focus on the threshold pleading argument by the Appellant which was, in essence, that the pleading was defective because of failure to plead the defamatory meanings of the words complained of, whether in the normal and ordinary sense or by innuendo. .

[16] We have noted the Respondents' contention that this ground of appeal is baseless and improper because they have pleaded in their Statement of Defence clearly as per paragraphs 4 and 5 the defamatory meanings of the impugned words when read together with the visuals, i.e., the pictures of the Respondents ("R1 and R2") in the articles accompanying the pictures. It was emphasised that the said pictures were defamatory particularly because they had no connection whatsoever with the parties referred to in the articles and were intended wholly to defame R1 and R2. Hence, that the LHCJ had correctly concluded that if a reasonable man were to see the photographs and read the accompanying articles, he would get the impression that the damaging statements in the articles were directed at the Plaintiffs with the intention of defaming them or damaging their reputation.

[17] It was also brought to our attention that the Appellant ("NSTP") had applied to the High Court under Order 18, rule 19 of the Rules of Court, 2012 to strike out the suit but the same LHCJ had dismissed the striking out application. No appeal to the Court of Appeal was filed by NSTP against this decision which must, thus, be deemed to have been accepted by NSTP.

[18] We will now proceed to scrutinise the Plaintiffs' averments in their respective Statements of Claim ["SOCs"] with emphasis on whether they had failed to plead the defamatory meanings, either in their natural and ordinary meaning or by way of innuendo, allegedly directed of them from the words and/or statements contained in the 1st, 2nd and 3rd Publications.

[19] Reliance was placed on the English Court of Appeal case of **Allsop v Church of England Newspaper Ltd and Other [1972]** 2 All ER 26 which held as follows:

> "In action for defamation it was desirable that the plaintiff should set forth what he alleged to be the defamatory meaning borne by the words were used in a defamamtory sense other than their ordinary meaning: the reasons were (a) so that the defendant should know the case which he had to meet and to decide whether to plead justification or fair comment, or to apologise: and (b) so that the trial could be properly conducted by enabling the judge to rule whether the words were reasonably capable of the meaning alleged."

[20] We accept that it is trite law that a SOC that does not particularise the alleged defamatory meanings of the offensive words in a libel action would be rendered defective.
[See **DDSA Pharmaceuticals Ltd v Times Newspaper Ltd and Another [1972]** 3 AII ER 417]

[21] We concur with the Appellant that in the present action they were left in a state of uncertainty in determining the defamatory meanings allegedly imputed to them by the Respondents from the words and/or statements contained in the 3 Publications. As a result, the Respondents' pleadings in respect of the libel action would be rendered defective and unsustainable on this ground alone.

[22] Next, we would deliberate on another threshold issue as to whether the Respondents had proved that the impugned words and/or statements in the said publications actually referred to the Respondents which the Appellant vehemently denied. The onus falls wholly on the Respondents to fulfil this vital element of their pleaded claim.

[23] In support of the Appellant's contention on this crucial issue, reliance was placed on the Court of Appeal ["COA"] decision in **Penerbit Sahabat (M) Sdn Bhd & Anor v Kalairasi a/p Arumugam [2016]** 1 MLJ 330 wherein it was held that the disputed article therein was not capable of referring to the claimant, despite the fact that a photograph of the claimant was wrongly published together with the disputed article. It was pointed out that the facts in that case had a close resemblance to the present facts and it was concluded that the claim was not sustainable because the disputed article had not once referred to the claimant either by name or

through other means, but instead referred solely to one Ms. Sujatha. Ahmadi Asnawi, JCA in his judgment pronounced that:

> "[29] At the end of the day the twin questions that arises is whether can the article in law, having regard to its language, be regarded as capable of referring to the respondent. Secondly, whether the article, in fact, would lead reasonable people, who know the respondent, to the conclusion that it does refer to the respondent…"

[24] As regards the 1st Publication, the thrust of the Respondents' contention was that the full article (Encl. 5 pp 51) was a stand alone article and is separate from that appearing at Encl. 5 pp 25 and does not form part of the 1st Publication.

[25] We have been urged to determine whether this contention is wholly misconceived on the premise that from a perusal of the document appearing at Encl. 5 pp 25 (which is a print out of the NST Online page), at the bottom portion of the document, the author's name and photograph, i.e. Audrey Dermawan and the date and time of the Publication, i.e. 13.3.2017 at 1.01 pm can be clearly seen by an ordinary reader.

[26] On scrutiny of the document appearing in Encl. 5 pp 51, it would appear that the same details as above appear at the top portion of that document. Hence, it was submitted that the impugned photograph and the full article formed a single document and/or article and were in fact inseparable. As such, that any reader visiting the NST online website would have the impression that the offensive photograph was published together with the full article and not just the caption appearing in the 1st article.

[27] We note that it is trite principle that in a libel action parts of a publication must not be viewed in isolation but the publication must be read and/or taken as a whole to determine its true meaning and intention. In **Keluarga Communication v Normala Samsudin [2006]** 2 MLJ 700, Zulkefli Ahmad Makinudin, JCA (as His Lordship then was) at page 708, remarked that:

> "At the outset, we would state that the test to be applied when considering whether a statement is defamatory of a plaintiff is well settled in that it is an objective one in which it must be given a meaning a reasonable man would understand it and for that purpose, that is, in considering whether the words complained of contained any defamatory imputation, it is necessary to consider the whole article. Gatley on Libel & Slander (10th Ed) on this point at pp 108 and 110, inter alia, states as follows:
>
> It is necessary to take into consideration, not only the actual words used, but the context of the words.
>
> It follows from the fact that the context and circumstances of the publication must be taken into account, that the Plaintiff cannot pick and choose parts of the publication which, standing alone, would be defamatory. This or that sentence may be considered defamatory, but there may be other passages which take away the sting".
>
> "Still on the same point in the case of Charleston v News Group Newspapers Ltd [1995] 2 AC 65, Lord Bridge of Harwich in delivering the speech of the House of Lords at p 70 had quoted this passage as follows:

… the question here is, whether the matter be slanderous or not, which is a question for the jury; who are to take the whole together, and say whether the result of the whole is calculated to injure the plaintiff's character. In one part of this Publication, something disreputable to the plaintiff is stated, but that is removed by the conclusion; the bane and the antidote must be taken together."

[28] We concur with the judgment in the above case that the proper approach that the trial Court should adopt in a libel action is not to view the impugned article in respect of the offensive words statements in isolation or in parts but as a whole and to take into account the context and circumstances surrounding the Publication of the article.

[29] The Respondents' proposition on this vital fact as to the identification of the Respondents in the impugned articles did not find favour with us. They contended that the LHCJ had not erred in her finding that by innuendo a reasonable man reading the articles would have the impression that the restaurant referred to in the articles was the 2nd Respondent based on the accompanying photograph which showed the 1st Respondent in his restaurant (RNKI). She was of the view that the reader would have automatically and naturally reached that conclusion and have the impression that the 2nd Respondent was a filthy and unhygienic eatery. Referrence was made to the Federal Court case of **Raub Australia Gold Mining Sdn Bhd v Hue Shieh Lee [2019]** 3 MLJ 720 where the Federal Court pronounced as follows:

"Assuming the plaintiff in a defamation suit has shown that the words bear some sort of defamatory imputation, he must then proceed to

establish that the defamatory words in question were published of and concerning him."

[30] It was alleged that the captions when read as a whole together with a view of the photograph would clearly implicate the Respondents and have defamatory imputations concerning them. In support of her finding, the LHCJ remarked that NSTP had failed to proffer any reasonable explanation as to why the photograph of the Respondents was published when DW1 admittedly knew very well that they were not involved in the matter of unhygienic restaurants in Penang that was the subject highlighted by the articles. Hence, that there was a manifest intention to defame the Respondents. It was emphasised that the articles specifically targeted 2 well known restaurants, Line Clear and Yasmeen, as such, it was plainly injustified and malicious to publish the photographs of the Respondents.

[31] While we fully understand the position taken by the Respondents as above, we must reiterate the established principle that the article must be read in its entirety and not in parts or in isolation to determine whether it had defamatory tendencies particularly and specifically against the Respondents. As alluded to, the alleged defamatory caption came with a link to another caption that was published together with the former which gave the true and correct identity of the entities that were the subject of the publication. It was obvious to us that the caption which was a print out of the NST online page bearing the author's name and date and time of publication was directly linked to the full article, the publication of which contained the same particulars. In our view, it meant that a reasonable and attentive reader could not have been misled as to the restaurants referred to in the impugned publication.

[32] Granted the photograph accompanying the 1st Publication shows the Respondents, it is undisputed that the impugned articles make no reference to the Respondents but to a category of restaurants in Penang not maintaining basic cleanliness. The necessary information to the concerned reader as to the identities of the restaurants responsible is provided amply by the link leading to the news report therein with the vital details.

[33] To conclude on this issue at hand, we would uphold the Appellant's proposition that in ascertaining whether the said offensive words/statements in the 1st Publication referred to the Respondents, the Publication must be read as a whole, meaning the title, the photograph and the accompanying caption together with contents of the news report provided by the link below the caption.

[34] In determining this vital issue of whether the impugned Publication concerned the Respondents the LHCJ appears not to have adopted the correct approach by merely focusing on the photograph and the accompanying caption without considering the 1st Publication as a whole including the report accessible through the link provided.

[35] As captured in the Appellant's submission, the Respondents' complaint in essence was centered on the use of the Photograph which was published together with the 1st Publication entitled "2 famous Penang 'nasi kandar' restaurants infested with rats, cockroaches, ordered shut". However, the Appellant was correct, in our view, in submitting that the reasonable man having read the Publication as a whole would not reach the conclusion that the Respondents' restaurant was the subject of the disparaging remarks due to the following factors:

1. The Photograph which was published together with the 1st Publication [Encl. 5 pp 25] bears a caption which states "(File pix) A clean eatery ensures patrons' health. Two nasi kandar restaurants in George Town, Penang were ordered closed for two weeks due to unhygienic conditions."

2. The caption accompanying the Photograph, i.e. "(File pix) A clean eatery ensures patrons' health …", clearly indicates that the Photograph was used only for illustration purposes to demonstrate how a clean restaurant should be. Therefore, any reasonable person would not implicate Theyagarajan's and RNKI's premises and/or restaurants as being one of the two (2) nasi kandar restaurants in George Town, Penang which were ordered closed for two (2) weeks due to their unhygienic conditions.

3. In addition, the subsequent caption accompanying the Photograph, i.e. "Two nasi kandar restaurants in George Town, Penang were ordered closed …", clearly states that the two (2) nasi kandar restaurants which were ordered closed for two (2) weeks due to unhygienic conditions are located in George Town, Penang. PW1 in his evidence at trial confirmed that none of Theyagarajan's and RNK's premises and/or restaurants were located in George Town, Penang. Their premises and/or restaurants were located in Bukit Mertajam, Penang and Kulim, Kedah respectively.

[36] Bearing in mind the title of the 1st Publication, i.e., 2 famous nasi kandar restaurants in Penang it was unlikely for a reasonable reader from

that region to be mistaken that RNKI was among the restaurants being referred to in the photograph or the caption. Rightly, the curiosity of the concerned reader would be aroused to ascertain the famous restaurants involved by probing further and reading the entire article before coming to any conclusion in his mind. A valuable guide is provided by the leading case of **Morgan v Odhams Press Ltd & Anor [1971]** 2 All ER 1156 as follows:

> "… The question is one purely of identity. 'Are the words capable of being understood to refer to the plaintiff?' In my view, a somewhat more exacting test should be predicated where the question is one of identity. It is not sufficient for the reader to say "I wonder if the article refers to Johnny Morgan" nor is pure speculation sufficient. Nor is it sufficient that a reasonable person believes that the words refer to the plaintiff. The test is an objective one. The ordinary reader must be fair-minded and not avid for scandal. He must not be unduly suspicious. The ordinary reader must have rational grounds for his belief that the words refer to the plaintiff…"

[37] As regards the 2nd Publication, it is clearly linked to the 1st Publication as explained by the Appellant as follows:

> "In relation to the 2nd Publication [Encl. 5 pp 26], it must be noted that it is actually a post on NSTP's Facebook page known as NST Online, which shared a link to the 1st Publication. This is apparent from the link (i.e. NST. COM.MY) appearing below the caption "2 famous Penang 'nasi kandar' restaurants infested with rats, cockroaches, ordered shut."

[38] By clicking on the post itself for the 2nd Publication, the reader would be directed to the 1st Publication and would easily come to know of the identities of the said 2 famous nasi kandar restaurants in Penang which plainly did not include RNKI. Society today being widely exposed to social media, it is most unlikely that the ordinary reader would not be able to access the full article by clicking on the relevant link which can be regarded as a simple process in this time and age.

[39] In the circumstances, we agree with the Appellant that the LHCJ had failed to adopt and/or apply the correct reasonable man test based on the current development of society on the reading of news reported on social media such as Facebook when she concluded that the reader would not know of the restaurants actually implicated simply because there was no link below the offensive photograph stating "click here to read more."

[40] It is settled law that in applying the reasonable man test to the purported defamatory publications, current trends, development and behaviour of society are important factors as succinctly expressed by the Federal Court in **Raub Australian Gold Mining Sdn Bhd (in creditors' voluntary liquidation) v Hue Shieh Lee** (supra) where Ramly Ali, FCJ remarked that:

> "The words complained of must be defamatory to an ordinary reasonable person within today's society (i.e. at the time the words were uttered). In applying the said test, the Court of Appeal had correctly considered the attitude of the society at the time of the publication of the first article particularly on the existence of activists group which was very much part of today's society that have

contributed much to the general well-being of the society at large. The Court of Appeal had also considered that 'we now live in a much more liberal society where the concept of transparency and accountability are very much part and parcel of our lives'. The prevailing attitude of the society at the time of the Publication of the article need to be considered by the court, without the need for pleading or proof (see: Chen Cheng & Anor v Central Christian Church and other appeals [1999] 1 SLR 94; Lennon v Scottish Daily Record and Sunday Mail Ltd [2004] EWHC 359 (QBD); and Lukowiak v Unidad Editorial SA [2001] AII ER (D) 108 (Jul); [2001] EMLR 1043)".

[41] Hence, the LHCJ's view that there ought to have been an indication on the link as she explained was not tenable based on the above principle due to, amongst others, failure to consider the mind of the reasonable man in today's society exposed to online media.

[42] Under the circumstances, it is plain to us that, on reading the 2nd Publication, the obvious impression created in the reader's mind would be that it was in reference to the 2 famous nasi kandar restaurants named specifically therein which did not include the 1st Respondent.

[43] With respect to the 3rd Publication, as stressed by the Appellant, it was clearly a reference to NSTP's online news and this can be seen from the document at Encl. 5 pp 50 itself, where there is specific use of the words "Social media/NEWS" and "NST Online" as well as the address of NSTP's website (NST Online), i.e. WWW.NST.COM.MY appearing at the top right hand corner of the document and also after the headline as adverted to.

[44] We are satisfied that the 3rd Publication is strikingly similary in content to the 2nd Publication albeit in a different print form. In view of its indisputable link with the 1st Publication, we do not propose to say any further on whether it had defamatory imputations against the Respondents save that the full article in relation thereto is to be found in the 1st Publication which makes no reference to the Respondents. PW1 himself conceded that nowhere in the 2nd article is reference made to the Respondents whereas the 3rd Publication concerns the same restaurants implicated in the 2nd article being ordered to be closed. It is plain to us that the reader of the 3rd Publication would not be led to the conclusion that the Respondents were being implicated. In this regard what is stated by Gatley on Libel and Slander (10th Ed) at para 3.31 is in point:

> "Meaning collected from other parts of same Publication or from other Publications. Where a newspaper article refers to another report in the same issue either party is entitled to have that read as part of the context in which the meaning of the words complained of is to be determined. It may, however, be necessary to go outside the particular vehicle in which the words complained of are contained."

[45] Considering that in our judgment the LHCJ had erroneously held that the impugned Publications together with the words therein referred to the Respondents, we would adopt the approach taken by the Court of Appeal in **Penerbit Sahabat (M) Sdn Bhd & Anor v Kalairasi a/p Arumugam (supra), Ahmadi Asnawi JCA** held at page 340 as follows:

> "Since the respondent has not discharged the burden of proving the threshold that the words in the said article indeed referred to the

respondent, we opined that there is no necessity to delve into the issue of whether the said words complained of are defamatory of the respondent or otherwise."

[46] As it is abundantly clear that, in the instant case, when the 3 impugned Publications are read in their context as a whole, they are not capable of referring to either Respondent or both, there is no necessity for us to delve into the issue of whether the words complained of are defamatory in nature and we do not propose to do so. Suffice for us to say on this point that the words and/or statements in the 3 impugned Publications when read in context were rightly contended by the Appellant to bear no defamatory imputations having the tendency to tarnish Theyagarajan's and RNKI's reputation and/or business. As such, they are not capable of exposing Theyagarajan and RNKI to hatred, ridicule or contempt in the mind of a reasonable man or having the tendency to lower them in the estimation of right-thinking members of society generally. As such, the present libel claim would not be sustainable in law.

[47] Proceeding now to the defences raised by NSTP, notwithstanding that we have held that the Plaintiffs' libel claim has not satisfied the threshold test that the impugned words carry a defamatory, missing the issue of the defences raised by NSTP, merits some comment by us. This is so because of the serious omission and/or failure by the LHCJ to consider the defences of justification, fair comment and qualified privilege relied upon by NSTP before concluding that NSTP is liable against Theyagarajan and RNKI for libel.

[48] Notably, the said defences as pleaded in the Appellant's Defence were not even challenged or rebutted by the Respondents who failed to

file any Reply to Defence in answer to the facts raised by the Appellant to support its pleaded defences.

[49] From our perusal of the Appellant's Statement of Defence, it is plain to us that the Appellant has sufficiently and specifically pleaded the recognised defences to the tort of libel, namely, justification, fair comment and qualified privilege. Importantly, the material facts and necessary particulars to substantiate the said defences have also been properly pleaded that should have warranted serious and careful consideration by the LHCJ who had, with respect, plainly failed to do so without any explanation. She had, in fact, even omitted to address the same in passing in the course of finding the Appellant liable for defamation as pleaded for the impugned publications and accordingly, awarding damages thereafter.

[50] In gist, the Appellant placed reliance on some crucial facts common to the pleaded defences. Amongst others, the most important fact pleaded was that the publications were factual in nature based on a health inspection carried out by the Penang Department of Health ["DOH"] on 13.3.2017 at the restaurants concerned which was a widely reported event. The results of the inspection as published by NSTP were matters of fact and not unfounded media comments or opinions. Likewise, that following the said inspection the famous restaurants were ordered to be closed. Secondly, that the Publications were made in good faith without any malice or intention to sensationalise the incident or to profit from reporting the same. Instead, the intention was purely to publish validly obtained information from the DOH Penang. Thirdly, that the impugned articles were published in good faith in the public interest and wholly for

the benefit of the public from the health perspective in line with the Appellant's social and legal responsibility to the general public.

[51] We have to stress that, in regard to NSTP's pleaded defences, RNKI and Theyegarajan in both the appeals have chosen not to address or challenge the said defences which we must reiterate have been speciafically pleaded with sufficient particulars and material facts. In effect, none of these have been challenged or rebutted by RNKI and Theyegarajan whether in their pleadings or submissions before us.

[52] In the circumstances, we are inclined to agree with the Appellant NSTP that it is a plain error of principle on the part of the LHCJ in failing or omitting to consider and address her mind to the said defences before arriving at her conclusion that defamation had been proved against NSTP on the present facts.

[53] We will now proceed to deal with the appeal on quantum by the Appellants in the 1st Appeal. Essentially the Appellants contended that the awards by the LHCJ were manifestly low and inadequate considering the serious loss of reputation and business allegedly suffered by them as a result of the alleged defamatory words and statements published by NSTP to the public at large.

[54] The LHCJ in assessing damages concluded that in the light of the facts and circumstances as per the evidence adduced a fair and reasonable award would be RM50,000 for each Plaintiff. In her Grounds of Judgment ["GOJ"] in respect of quantum, the LHCJ at the outset held the awards for GD sought by both the Plaintiffs in the sums of RM20 million and RM50 million to be manifesty and extremely excessive in the

circumstances of this case. For the reasons that the LHCJ had stated, we find no error whatsoever in the LHCJ's view as the sums claimed were well above the current discernible trend for libel claims and unjustifiable.

[55] After referring to the Plaintiffs' evidence in support the LHCJ found that the alleged loss of profits by RNKI had not been proved as there was no supporting evidence that RNKI had suffered the loss as claimed as a result of the impugned publications. In making her finding the LHCJ took into account the relevant material facts that were not in dispute. Amongst others, that RNKI which had been registered in early 2001 closed down on 27.5.2017 after experiencing loss of business throughout the period except for several years until 2006. The losses occurred well before the alleged defamatory publication. The Respondent Theyegarajan's assertion that RNKI had made a gross profit of RM2 million annually was not supported by any documentary evidence but on the contrary, was contradictory to the declaration that the company had made to the Customs Department as to the reasons for its closure of business on 27.5.2017.

[56] The LHCJ agreed with NSTP's contention that as RNKI had ceased to operate barely 2 months after the said Publication, it did not make sense for a business that grossed RM2 million in profits annually to do so within such a short span of time. Importantly, that in principle, for a claim of defamation the Plaintiff bears the onus of proving not only the quantum claimed but also that the losses or damages resulted from the defamatory publications. It was the LHCJ's finding of fact based on the evidence that she had alluded to that the vital elements for the amounts claimed to be awarded had clearly not been proven. As pointed out by the Appellant, since the Publications in question had occured only in March 2017 and

RNKI had suffered a series of losses since its setting up it would be totally illogical for NSTP to be "grossly punished" by holding NSTP liable for RNKI's purported loss of goodwill in its business stretching from the date it began to operate the business of Restoran Nasi Kandar Irfanah (i.e. in 2001) until the present.

[57] It bears emphasis that RNKI's purported loss of profits is in fact a claim for special damages which in law must be strictly proved and not based on inconclusive evidence or mere assumptions. Hence, the LHCJ was entirely correct in insisting on strict proof and dismissing this head of claim by reason of a paucity of evidence and uncertainties that arose from the evidence itself as already alluded to. Additionally, both Plaintiffs had not specifically pleaded and particularised their claim for the purported loss of business of RNKI as alleged which would be fatal to any claim under SD.

[58] In regard to the LHCJ's assessment of the appropriate award of GD to RNKI to be only RM50,000, the crux of her view was that the Plaintiff had failed to prove that RNKI was a well known restaurant in the State of Penang, particularly in Bukit Mertajam and also in Kulim, Kedah since it was set up about 16 years ago and therefore, that it had lost goodwill and good reputation due to the defamatory articles. It was the LHCJ's finding of fact that RNKI was not shown to be a very famous restaurant in the Penang State and well known among the public for its reputation as claimed that would warrant a high award for GD.

[59] RNKI, in opposing the LHCJ's decision as above, placed reliance on the principle that a company is entitled to bring on action for libel which can be sustained if it is intended to protect its reputation. Reference was

made to **Borneo Post Sdn Bhd v Sarawak Press Sdn Bhd [1998]** 3 MLRH 250 where it was held, inter alia, that:

> "When Can A Company Sue for Defamation?
>
> It is held in **South Hetton Coal Company v North Eastern News Association Ltd [1894]** 1 QB 133 that an action for libel will lie at the suit of an incorporated trading company is respect of a libel calculated to injure its reputation in the way of its business without proof of special damage but not in respect of anything reflected upon them personally."

[60] In contending that the LHCJ had adopted an erroneous approach in assessing GD, RNKI urged us to consider the judgment of Gopal Sri Ram, JCA (as he then was) who made reference to the book "Defamation Law, Procedure and Practice" by Price Doudo 3rd Ed. at p. 208 which enumerated the principles that should guide the Court in the assessment of damages for the tort of defamation as follows:

(a) The gravity of the allegation;
(b) The size and influence of circulation;
(c) The effect of publication;
(d) The extent and nature of claimant's reputation;
(e) The behaviour of the defendant;
(f) The behaviour of the claimant.

[See **Chin Choon v Chua Jui Meng [2004]** 2 MLRA 636]

[61] We have duly taken cognisance of the principle expounded by the Learned Judge in the above case and the guidance offered by the said learned author of the textbook. However, we are not persuaded that the LHCJ's assessment of damages that was wholly based on the totality of the evidence and/or the lack of it adduced by the Plaintiffs on whom lay the onus to plead and prove the damages was a serious error in fact or principle that would merit the award made being quashed.

[62] In determining whether the LHCJ's award of RM50,000 was reasonable, we must bear in mind the current trend and settled principle that the award of damages in defamation cases should not be overly excessive and exorbitant having in mind the parties' standing and reputation in society to which, in our view, the LHCJ had given fair consideration. We are in agreement with the following passage from the Court of Appeal's Judgment in **Abu Hassan bin Hasbullah v Zukeri Bin Ibrahim [2018]** 6 MLJ 396 where Asmabi Mohamad, JCA held at page 420 as follows:

> "Perhaps it would be appropriate at this juncture for us to examine the pattern and or trend of damages awarded by the court in order to ascertain what would be a fair and suitable damages to be awarded to the plaintiff. In **Chin Choon @ Chin Tee Fut v Chua Jui Meng [2005] 3 MLJ 494; [2005]** 2 CLJ 569 for instance where the defamation case involved a Cabinet Minister, the Court of Appeal saw it fit to reduce the award of damages of RM1.5m to only RM200.000. The court ruled that the award of RM1.5m awarded by the High Court was excessive. In **AJA Peter v OG Nio & Ors [1980]** 1 MLJ 226; [1979] 1 LNS 1 which case concerned a claim by an insurance supervisor of an insurance company against another

agency supervisor, the award of damages of RM15,000 was reduce to RM9,000.

The amount of damages to be awarded by the court in each case dependes on the facts and the circumstances of the case. Looking at the facts of this case, the position of the plaintiff, the behavior of the defendant, we awarded compensatory, aggravated and exemplary damages of RM70,000 to the plaintiff. We are of the view that the damages awarded by the court is adequate to vindicate the plaintiff to the public and console him for the wrong done to him by the defendant."

[63] In the circumstances, we would conclude on GD that the award made by the LHCJ has not been shown to our satisfaction to be plainly incorrect or manisfestly inadequate to justify being disturbed on appeal.

CONCLUSION

[64] For the Appeal 2164 by NSTP, we find there is merit in this appeal. It is our considered view that the LHCJ was plainly wrong in her decision to allow the Respondents' claim for defamation and amongst others the LHCJ had misdirected herself by failing to consider the defences pleaded by the Appellant. We therefore allow the appeal with costs and we set aside the order of the High Court Judge dated 21.10.2019.

[65] For the Appeal 2163 by RNKI, we find there is no merit in the appeal on quantum of damages and it is accordingly dismissed. Costs of RM25,000.00 here and below for both appeals to the Appellant/Respondent NSTP.

Dated: 30 September 2021

- Sgd -

GUNALAN A/L MUNIANDY
Judge Court of Appeal
Putrajaya

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